Supreme Court, U.S.
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CASE NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

ANNABELLE WINTERS,
D/B/A SHARP'S PAWN SHOP
PETITIONER

V

BOARD OF COUNTY COMMISSIONERS,
OF OSAGE COUNTY, OKLAHOMA, ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tenth Circuit Court of Appeals erred when it failed to consider the implications of the reporting requirements of the Oklahoma Pawnshop Act (Okla. Stat. Ann. tit. 59 § 1501, et seq. [West. 1993]) on the constitutional rights of equal protection and financial privacy of millions of pawn customers when it found those statutes to be constitutional?

LIST OF ALL PARTIES TO THE PROCEEDING

The only other parties to the proceedings below not listed in the caption are: OSAGE COUNTY SHERIFF'S DEPARTMENT; GEORGE WAYMAN, individually and as Deputy Sheriff of Osage County, Oklahoma; and DALE PENNY, individually and as Deputy Sheriff of Osage County, Oklahoma.

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Report and Recommendation of the U.S. Magistrate Judge of the United States District Court, Northern District of Oklahoma, is attached as Appendix A.

Order denying Plaintiff's Motion for Summary Judgment and granting Defendants' Motion for Summary Judgment of the United States District Court, Northern District of Oklahoma, is attached as Appendix B.

Judgment dismissing action of the United States District Court, Northern District of Oklahoma, attached as Appendix C.

Decision of the United States Tenth Circuit Court of Appeals is attached as Appendix D.

Order denying Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc of the United States Tenth Circuit Court of Appeals is attached as Appendix E.

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OPINIONS AND ORDERS

1. On September 2, 1993, the Tenth Circuit Court of Appeals reversed and remanded in part and affirmed the decision entered by the United States District Court for the Western District of Oklahoma concerning the pawn customers' right to privacy. Winters v. Board of County Commissioners, 4 F.3d 848 (10th Cir. 1993).

2. Petitions for Rehearing filed by the parties were denied on October 6, 1993.

3. Judgment was entered in the District Court for Western Oklahoma on February 13, 1992, without published opinion.

JURISDICTIONAL STATEMENT

Petitioner, Annabelle Winters, doing business as Sharp's Pawn Shop, seeks review of the Tenth Circuit decision rendered in her case on September 2, 1993. A Petition for Rehearing was filed in the case, thus the time to file this Petition began to run on October 6, 1993. No extension to file for a Writ of Certiorari has been sought in this case. Jurisdiction is proper pursuant to Supreme Court Rule 10.1(c), which allows the Court to assume jurisdiction in a case where "a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court".

STATUTORY PROVISIONS AT ISSUE

1. 42 U.S.C.A. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. Okla. Stat. Ann. tit. 59 § 1508(a):

> "Such books, accounts, papers, correspondence, records and property taken, purchased or received shall also be open for inspection at any reasonable time to federal law enforcement officials and the chief of police, district attorney, sheriff or written designee of the law enforcement body in whose jurisdiction the pawnshop

is located, without any need of judicial writ or other process. In the course of an examination, the Administrator or his duly authorized representative or any authorized peace officer shall have free access to the office, place of business, files safes and vaults of such licensee, and shall have the right to make copies of any books, accounts, papers, correspondence and records insofar as they pertain to the business regulated by Section 1501 et seq. of this title."

3. Okla. Stat. Ann. tit. 59 § 1515(A) and (C) (West 1993)

A. Any pawnbroker shall make available a copy or report within three (3) days of any buy transaction to the local law enforcement agency of the municipality or other political subdivision in which the pawnshop is located; provided, merchandise bought on invoice from a manufacturer or wholesaler with an established place of business is exempt from this reporting requirement. However, such invoice shall be shown upon request to the Administrator or his duly authorized representative or any authorized peace officer. The copy or report shall include:

1. The name and address of the pawnshop:

2. The name, address, race, sex, weight, height, date of birth and either identification number of the seller as verified by either a state-issued identification card, driver's license or federal government-issued identification card or by readable fingerprint of the right or left index finger on the back of the pawn or buy transaction copy to be retained for the pawnbroker's record;

3. The buy transaction number;

4. The date and time of the transaction;

5. The manufacturer of the item;

6. A description of the item; and

7. The serial number and model number where available and any other identifying markings.

* * *

C. Any pawnbroker shall make available a copy or report within three (3) days of any pawn transaction to the local

law enforcement agency of the municipality or other political subdivision in which the pawnshop is located. The copy or report shall include:

1. The name and address of the pawnshop;

2. The name, address, race, sex, weight, height, date of birth and either identification number of the seller as verified by either a state-issued identification card, driver's license or federal government-issued identification card or by readable fingerprint of the right or left index finger on the back of the pawn or buy transaction copy to be retained for the pawnbroker's record;

3. The buy transaction number;

4. The date and time of the transaction;

5. The manufacturer of the item;

6. A description of the item; and

7. The serial number and model number where available and any other identifying markings.

STATEMENT OF THE CASE

Petitioner, Annabelle Winters, is the proprietor of Sharp's Pawn Shop, located in Osage County, Oklahoma. This action was commenced following the unconstitutional seizure and subsequent disposition of property confiscated from the pawnshop by employees of the Osage County Sheriff's Department. Petitioner invoked Federal Jurisdiction pursuant to 42 U.S.C.A. § 1983 and 28 U.S.C.A. §§ 1331 and 1343, and filed her action in the District Court for the Western District of Oklahoma. Following the trial court's grant of summary judgment in favor of all defendants, Petitioner appealed to the Tenth Circuit Court of Appeals alleging three (3) grounds for relief; (i) that the provisions of Okla. Stat. Ann. tit. 59 §§ 1508(a) and 1515 (West. Supp. 1993) and

Okla. Stat. Ann. tit. 12 § 1092 (West 1989) are unconstitutional; (ii) that the warrantless seizure of the property in question was in violation of Petitioner's Fourth Amendment rights; and (iii) that disposition of the property was made in violation of Petitioner's right to due process of law. The appeal was taken pursuant to Rule Four of the Federal Rules of Appellate Procedure.

The Tenth Circuit found in favor of Petitioner with respect to the second and third allegations and remanded the case for further proceedings as to certain defendants. Although the Appellate Court considered the facial constitutionality of the statutes as applied to Petitioner, the Court failed to address the ramifications of the statutes on the constitutional right of privacy of pawn customers,

finding only that federal banking regulations did not apply in the case of pawn transactions. The issue of the impact of information gathering and reporting, together with the interpretation that the pawnbroker must furnish law enforcement with a copy of the customers' contract on all loan transactions as a matter of course, remains unresolved. This delivery of loan/pawn contracts or reports directly affects the rights of customers in more than one million loans per year within the state. The Tenth Circuit's lack of appropriate consideration to this issue is the basis for this Petition.

ARGUMENT AND AUTHORITIES

More than one hundred years ago, in Chicago & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 345, 12 S.Ct. 400, 36 L.Ed.2d 176 (1892), this Court recognized its very important role in determining the rights of individual against the acts of government. This principal is no less true today than it was at the time the decision was rendered. In keeping with this important goal, this Court should exercise its discretion and grant certiorari in the present case in order to vindicate the significant constitutional rights of consumers who participate in more than one million pawn transactions per year in Oklahoma alone.

The issue of a pawn customer's right to private financial transactions has been

raised previously in the Tenth Circuit. In S&S Pawn Shop, Inc. v. City of Del City, 947 F.2d. 432, 439 (10th Cir. 1991), the Tenth Circuit noted that the issue had been raised, however, failed to address the issue on the basis of standing.[1] This case is significantly different.

From the outset of this action, Petitioner has established not only third party standing to bring this claim on behalf of her customers, but also, alternatively, to demonstrate that she, too, has suffered sufficient "injury in fact" to support the cause of action. Gladstone Realtors v. Village of Bellwood,

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[1]The Court noted in a footnote at page 438, after determining that standing to bring the claim was based on the rights of third parties, that "Appellant does not contend that his customers are prevented from asserting their alleged deprivation of privacy of which he complains."

441 U.S. 91, 100, 99 S.Ct. 1601, 60 L.Ed.2d 66, 77 (1979). Petitioner seeks to protect the privacy interests of her customers for several reasons. First, in order to litigate the lack of confidentiality associated with a pawn transaction, the customer would be forced to make the details of the transaction even more public. This hazard alone is sufficient to confer third party standing. NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). Additionally, the nature of most pawn transaction involves a small loan of short duration to a person with few resources. There is little incentive for a customer to engage in lengthy, expensive litigation simply to lose what he seeks to protect. In such a case, third party standing should be allowed to rectify the wrong:

> If the enjoyment of the right [by the third party] is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly as effective a proponent of the right as the latter.

Singleton v. Wulff, 428 U.S. 106, 115-16, 96 S.Ct. 2868, 2874-75, 49 L.Ed.2d 826, 833-34 (1976).

Petitioner is the proper party to bring this claim because as the Tenth Circuit noted in S&S Pawn Shop, Inc. with respect to the effect of the statutory scheme on criminal activity, there is no meaningful way to measure the potential number of customers lost as a result of the lack of confidentiality in their

dealings, leading to the conclusion that Petitioner continues to suffer her own injury from the unconstitutional effect of the statutes in question. This Court has very sensibly recognized the chilling effect certain actions may have on a business. In Department of Labor v. Triplett, 494 U.S. 715, 720, 110 S.Ct. 1428, 108 L.Ed.2d 701, 713 (1990), this Court held:

> When, however, enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractional relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement), third party standing has been held to exist.

See also Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343, 354 (1975).

In the decision below, the Tenth Circuit considered the constitutionality of §§ 1508(a) and 1515 with respect to the privacy issues only so far as to hold that the provisions of the Privacy Act 5 U.S.C. § 522 (a) and Federal Privacy Laws 12 U.S.C. § 3401 et. seq. do not apply to pawn transactions. Petitioner has no quarrel with this portion of the resolution. The opinion, however, failed to address the crux of Petitioner's complaint: the Equal Protection ramifications inherent in the disparate treatment of customers of pawnshops versus the customers of more traditional financial institutions.

This Court may find that a statute violates the Fourteenth Amendment if it is so lacking in rational basis that when

compared with others similarly situated, the rights of the plaintiff are violated. Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Certainly the disparity between the two types of consumers is obvious and is obviously predicated on the lack of financial resources available to the pawn customer.

The statutes involved in this action, especially § 1515, provide a number of procedures which a pawnshop must take with respect to the identification of its customers which no other money lending institution in the State of Oklahoma must undertake. In fact, the very information of which disclosure is mandated is statutorily confidential for bank

customers. This disparate treatment of the two (2) types of money lenders is not constitutionally sound.

The collection and dissemination of information garnered through pawnshop transactions is justified on the basis that there is a strong state interest in the prevention of providing a market for stolen property[2].

Law enforcement in Osage County and throughout the state interprets the

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[2]In New York v. Burger, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987), this Court justified the regulation of automotive junkyards on the basis that they provided "a major market" for stolen cars. The Tenth Circuit found in S&S Pawn Shop, Inc., only that pawnshops provide "a market" for stolen property. S&S Pawn Shop, Inc., 947 F.2d at 437. Certainly, the same could be said for banks with respect to illegally obtained funds. There is no discernable distinction between the two (2) differing "markets" for illegal goods---whether it be money or property.

statutory language of § 1515 "make available" to require the pawnbroker to furnish copies of al pawn transactions containing all customers' vita to law enforcement as a matter of course. This is so notwithstanding that fewer than one thousand transactions out of more than a million transactions involve stolen property. S&S Pawn Shop, Inc., 947 F.2d at 437.

Persons utilizing pawnshops tend to be underclass citizens who lack the resources to borrow money through traditional means. The Supreme Court has indicated that class lines drawn on wealth related criteria may in fact be subject to the strict scrutiny standard which is applied to suspect classifications. Harper v. Virginia Board of Elections, 383 U.S. 663

(1966), but cf. James v. Valtierra, 402 U.S. 137 (1971). In any event, there is a clear line of distinction between the privacy rights of those persons who can afford the luxury of a traditional lending institution and those relegated to the pawn industry.

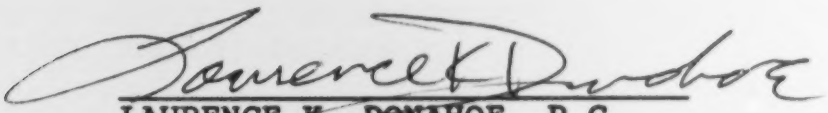
Certainly, the banking industry is the subject of pervasive regulation. Unquestionably a significant amount of money deposited in banks stems from illegal sources. Regardless of the potential relation to illegal activities, however, banks are not required to disclose or report the name, address, social security number, ages, sex, race, and amount of the loan of every customer and the details of each transaction so that the proper law enforcement agencies

might obtain information leading to the identification of an offending depositor or borrower.

Quite simply, there is no reasonable justification for the differing levels of confidentiality. Customers of pawnshops have an equal expectation of privacy in their financial transactions as do customers of a bank. Requiring disclosure of detailed information from one (1) group of borrowers, but not others similarly situated, violates the Fourteenth Amendment in a manner which should not be condoned by this Court. See Thornburgh v. American College of Obstetricians, 476 U.S. 747,766, 106 S.Ct. 2169, 90 L.Ed.2d 779, 797 (1986) (Court struck down requirement that detailed personal information be delivered to the state in every case of abortion.)

Petitioner respectfully requests this Court to consider the merits of this issue and determine that the disclosure of detailed personal information about each customer to law enforcement agencies, as required by § 1515 is unconstitutional.

Respectfully submitted,



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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CASE NO: 90-C-508-C

ANNABELLE WINTERS, d/b/a SHARP'S PAWN SHOP,

Plaintiff,

v.

BOARD OF COUNTY COMMISSIONERS OF OSAGE COUNTY, OKLAHOMA, et al,

Defendants.

REPORT AND RECOMMENDATION OF
U.S. MAGISTRATE JUDGE

This Report pertains of defendants' Motion for Summary Judgment (Docket #8)[1] and plaintiff's Motion for Summary Judgment (#10). A hearing was held on January 14, 1991, and oral arguments were heard.

This action involves a dispute arising out of the Osage County Sheriff's Department's March 9, 1989, search of plaintiff's pawnshop and the seizure and subsequent disposition of a ring located on the premises of this pawnshop. The plaintiff brings this action to recover for violations of her constitutional

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[1]"Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

rights arising out of the warrantless seizure and the subsequent disposition of this ring without a hearing. Plaintiff also alleges that the Oklahoma statutes requiring a pawnshop to display goods, 21 O.S. § 1092 and 59 O.S. 1508(A), are unconstitutional under the Fourth Amendment to the U. S. Constitution. Plaintiff also claims that the Oklahoma Pawnbroker Act, 59 O.S. § 1515, violates her right to privacy under federal laws, 5 U.S.C. § 522(a) and 12 U.S.C. §§ 3401 et seq.

Defendants allege and plaintiff's claims are barred under the doctrine of qualified immunity, which grants law enforcement officers immunity from civil liability for discretionary functions if their conduct does not violate the constitutional rights of others.

Defendants Wayman, Pinney (sic), Stuart, and Landsdown claim their actions did not violate plaintiff's constitutional rights and therefore they are entitled to qualified immunity. Defendants Osage County and Osage County Sheriff's Office claim that plaintiff has failed to state a claim against them under 42 U.S.C. § 1983. The defendants also allege that the Oklahoma statutes relating to pawnshop activities are not unconstitutional under the Fourth Amendment and do not violate the federal privacy laws cited by plaintiff, 5 U.S.C. § 522(a) and 12 U.S.C. §§ 3401 et seq.

"[T]he plain language of Rule 56(c) [Fed.R.Civ.P.] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to

establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If there is a complete failure of proof concerning an essential element of the nonmovant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. Id. at 323.

A party opposing a properly supported motion for summary judgment may not rest upon mere allegation of denials of his pleading, but must affirmatively prove specific facts showing that there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The Court sated that "the mere existence of a scintilla of

evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252.

The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

The record must be construed liberally in favor of the party opposing the summary judgment, but "conclusory allegations by the party opposing . . . are not sufficient to establish an issue of fact and defeat the motion." McKibben v. Chubb, 840 F.2d 1523, 1528 (10th Cir. 1988). The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards

set by Celotex and Anderson. Setliff v. Memorial Hosp. of Sheridan County, 850 F.2d 1384 (10th Cir. 1988).

In order to state a cause of action under § 1983, plaintiff must show that defendants acted under color of state law in causing the denial of a federally protected right. Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972).

Illegal Seizure and Disposition Claim

Plaintiff first contends that her constitutional rights were violated, under 42 U.S.C. § 1983, by the warrantless seizure and subsequent disposition of a ring from her pawnshop without a hearing. Recently, the United States Supreme Court has found that to justify a warrantless seizure: "1) the item seized must be in plain view; 2) its incriminating character must be immediately apparent; 3) the

officer must be lawfully located in a place from which the object can be seen plainly; and 4) the officer must have a lawful right of access to the object itself". Horton v. California, _____ U.S. _____, 110 S.Ct. 2301, 2308, 110 L.Ed.2d 112 (1990).

However, prior to the Horton ruling, courts additionally found that, to satisfy the "plain view" exception to the requirement of a warrant, an officer must inadvertently discover the item. "[W]here the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it", there is not reason not to have a warrant. Collidge v. New Hampshire, 403 U.S. 443, 470 (1971). In Horton the Supreme Court overruled this inadvertence requirement of a "plain view" seizure. The Supreme Court

has not applied its ruling in Horton retroactively. Indeed, this court notes that principles of fairness would make such a retroactive application improper. Law enforcement officials should not be burdened with the fear that they will be held in violation of future law when they conform strictly to the law in effect at the time of the action.

In Wolfenbarger v. Williams, 826 F.2d 930 (10th Cir. 1987), the court established that the "plain view" exception to the requirement of a warrant did not apply to the actions of police officers who, after discovering stolen items in a pawnshop, seized such items without warrant. The court explained that there was no inadvertence, since the officers knew the location of the stolen items and intentionally went to this

location for the purpose of seizing such items. The Wolfenbarger court also found that pawnbrokers had substantive and procedural rights in property in their possession, and such property could not be taken without due process.

The Wolfenbarger facts are nearly identical to the facts of this case. Osage County Deputy Landsdown went to the pawnshop for the express purpose of seizing the stolen ring and, under Wolfenbarger, there was no inadvertent discovery.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonably person would have known."

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity is not merely a defense to liability, but also an immunity from suit protecting a defendant from discovery, trial, and other burdens of litigation.

A defendant claiming qualified immunity can seek dismissal if a plaintiff has not shown facts that establish that the defendant violated clearly established law. Pueblo Neighborhood Health Center, Inc., v. Losavio, 847 F.2d 642, 646 (10th Cir. 1988); Mitchell v. Forsyth, 472 U.S. 511, 527-30 (1985). Following a defendant's motion to dismiss, plaintiff must show any additional allegations that the defendant violated clearly established law. Pueblo Neighborhood, at 646. The court must then decide if plaintiff has show facts that would "sustain a

conclusion that defendant violated clearly established law". Powell v. Mikulecky, 891 F.2d 1454, 1457 (10th Cir. 1989).

The plaintiff must also demonstrate that the right in question was clearly established at the time of the defendant's conduct. Pueblo Neighborhood at 646. A plaintiff cannot meet this burden merely by identifying a clearly established right and alleging that the defendant violated it. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987). Unless the plaintiff demonstrates a clearly established right and the necessary factual allegations, the "government official is properly spared

the burden and expense of proceeding any further." Powell at 1457.

The law in effect at the time of the seizure at issue was clearly Wolfenbarger and the requirement of inadvertence, which was absent here. With the exception of the inadvertence requirement, the defendants met the requirements for a valid plain view seizure. The ring was in plain view. Under 21 O.S. § 1092 and 59 O.S. § 1508, the officers had a right to view the items in pawn and relevant records of such items. The police officers, knowing of the theft of the ring, on viewing it had probable cause to believe it was stolen and its incriminating nature was immediately apparent. The officers were lawfully in the pawnshop and by statute had a lawful right of access to the ring. However,

there was no reason that the officers could not have obtained a warrant to take the ring. Defendants Wayman, Pinney (sic), Stuart, and Landsdown therefore do not have qualified immunity from suit, as plaintiff has met her burden of showing that they violated clearly established law in effect at the time of the conduct.

As to plaintiff's claim that she was denied her due process rights by the manner in which defendants disposed of the ring, the court in Wolfenbarger stated that pawnbrokers have property rights over items in pawn sufficient to support an action for replevin. Pawnbrokers therefore must be accorded due process in regard to disposition of such goods. The plaintiff received no due process when the ring was seized from her pawnshop and given to the owner without a hearing to

determine the true owner. However, this issue is moot at this time, as plaintiff admitted at the hearing on the Motion for Summary Judgment that the ring was properly given to its true owner.

It is clear from the evidence that plaintiff's due process rights were violated by defendants' seizure of the ring taken from her pawnshop. However, the Supreme Court in Parratt v. Taylor, 451 U.S. 535 (1981), overruled in part on other grounds, 474 U.S. 327 (1986), recognized that post-deprivation remedies made available by the state can satisfy due process requirements. The Court determined that either the necessity of quick state action or the impracticality of providing meaningful pre-deprivation process, when coupled with the availability of some meaningful means by

which to assess the propriety of the state's action at some time after the initial taking, can satisfy those requirements. The Court concluded that "[a]lthough the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process". Id. at 544. The Court founds that the remedies provided by the state could have fully compensated the aggrieved person when a state employee negligently deprived him of his property, and thus they were sufficient to satisfy due process requirements.

In Hudson v. Palmer, 468 U.S. 517, 533 (1984), the Supreme Court went further and held that an unauthorized intentional

deprivation of property by a state employee does not constitute a violation of the procedural requirements of due process if a meaningful post-deprivation remedy for the loss is available.

Oklahoma has made available a meaningful post-deprivation remedy for plaintiff's loss. 22 O.S. § 991a-3.[2]

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[2]Title 22 O.S. § 991a-3 states:

> A. Upon a verdict or plea of guilty or upon a plea of nolo contendere for an offense in which any property is unlawfully obtained and the property is sold, traded, bartered pledged or pawned, the court may order the defendant to provide restitution to the buyer, recipient or pledgee of the property for the value of any consideration paid, loaned or given for the property unless the buyer, recipient or pledgee has violated the provision of Section 1092, 1093 or 1713 of Title 21 of the Oklahoma Statutes. Such restitution shall be in addition to any restitution for the victim and shall be in addition to any other penalties provided by law. Restitution to the buyer, recipient or pledgee shall be ordered pursuant

Plaintiff has not disputed the adequacy of the existing state law and admits that she received restitution in the amount of $60.00, which included the amount loaned on the property by plaintiff, plus $10.00 interest. Plaintiff does not argue that Mr. George Ward, who now has possession of the ring, is not the owner of the property. Thus she has been fully compensated for the property under post-

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to the provision of subparagraph a of paragraph 1 of the subsection A of Section 991a of Title 22 of the Oklahoma Statutes.

B. The buyer of any property which has been unlawfully obtained and which is lawfully returned to its rightful owner shall have the right to bring a civil action against the person who sold, traded, bartered, pledged or pawned the property for the value of any consideration paid, loaned or given for the property unless the buyer has violated the provisions of Section 1092, 1093, or 1713 of Title 21 of the Oklahoma Statutes.

deprivation procedures followed by the state. The unauthorized intentional deprivation of her property by state employees does not constitute a violation of procedural due process requirements, as a meaningful post-deprivation remedy for the loss was available.

Plaintiff's Motion for Summary Judgment as to her first claim should be denied and defendants' Motion for Summary Judgment as to plaintiff's first claim should be granted.

Constitutional Claims

Plaintiff further contends that 21 O.S. § 1092 and 59 O.S. § 1508(a), which allow police officers the right to view items in pawn and records pertaining to such items, are unconstitutional under the Fourth Amendment. However, in S&S Pawn Shop, Inc., v. City of Del City, No. CIV-

87-1457-T (W.D. Okla. Mar. 23, 1989), the Oklahoma court rejected an identical Fourth Amendment contention. The court in S&S Pawn Shop noted that a business operator has a reasonably expectation of privacy with respect to both police searches and administrative inspections, under New York v. Burger, 482 U.S. 691, 699 (1987). However, Burger also carved out an exception to the business operator's expectation of privacy in closely regulated industries.

The S&S Pawn Shop court found that Oklahoma's pawnshop industry is a closely regulated business, and thus an exception to the expectation of privacy exists. There are extensive statutory provisions regulating pawnshops. See 59 O.S. §§ 1501 et seq. A pawnshop owner is required to obtain a license and a bond, submit to

preliminary investigation, display the license, keep certain records, and make the records and property available for inspection. The fees which a pawnshop may charge are regulated, and the owner is subject to civil and criminal penalties for failure to comply with any of these provisions. In 1988, 59 O.S. § 1515 was passed, which contained additional reporting requirements regarding the identity of sellers and the identity of property bought or pawned. The S&S Pawn Shop court concluded that these factors all support the conclusion that the pawnshop industry is "closely regulated". This court should conclude, as the Oklahoma district court did, that Oklahoma's pawnshop industry is closely regulated and thus plaintiff's privacy rights are limited.

Plaintiff claims 21 O.S. § 1092 is unconstitutional, as it violates her right to be free from warrantless searches. However, as the court in S&S Pawn Shop pointed out, a warrantless inspection of a closely regulated business is reasonably if three criteria under New York v. Burger, 482 U.S. at 702-703, are met. There just be a substantial government interest that "informs" the regulations pursuant to which the search is made. Second, warrantless inspections must be necessary to further the regulatory scheme. Third, the inspection program must provide a constitutionally adequate substitute for a warrant, such as a statute advising the owner that the search is being made with a proper scope and limiting the discretion of the inspecting officers.

In S&S Pawn Shop, the judge found that Oklahoma's pawnshop statutes serve two purposes. Many of the provisions regulate lending practices of pawnshops. Other provisions, particularly 59 O.S. §§ 1508 and 1515 and 21 O.S. § 1092, appear to be designed, at least in part, to regulate receipt of stolen property. Section 1508 provides for warrantless inspections of records and property, section 1515 requires that descriptions of property received and the identity of sellers or pledgers be reported to law enforcement agencies, and section 1092 provides criminal penalties for failure to display property to owners or law enforcement officers.

The judge in S&S Pawn Shop noted that Oklahoma has a substantial interest in controlling property theft, and that

interest is served by regulating pawnshops, as the very nature of the pawn business provides an opportunity to sell stolen property. The court also found that warrantless inspections were necessary. Because the statute only requires a ten-day waiting period between receipt and sale by the pawnshop, property may pass quickly through a pawnshop. Frequent, unannounced inspections are required to ensure compliance with the statutes and detect stolen property. The court also found that § 1508 provides a constitutionally adequate substitute for a warrant, as it advises pawnshop owners that inspections will be conducted, provides that records kept and property received are subject to inspection, and identifies authorized inspectors. The statute provides for inspection "at any

reasonably time", a time provision approved by the United States Supreme Court in United States v. Biswell, 406 U.S. 311 (1972). Although the statute did not limit the time of inspections to regular business hours, the Court found that this did not render it unconstitutional, as there were no allegations that inspections have been conducted during non-business hours.

This court should conclude, as the court did in S&S Pawn Shop, that Oklahoma's pawn shop statutes allowing warrantless inspections are not unconstitutional, as they meet the criteria of New York v. Burger. Plaintiff's Motion for Summary Judgement as to her second and third claims should be denied and defendants' Motion for

Summary Judgment as to plaintiff's second and third claims should be granted.

Privacy Law Violations

Plaintiff finally contends that the Pawnbrokers Act, 59 O.S. § 1515(a), violates the federal Privacy Act, 5 U.S.C. § 522(a) and the Right to Financial Privacy Act, 12 U.S.C. § 3401, et seq. However, the Privacy Act was intended to prevent the disclosure of government information regarding individuals by federal agencies. Thomas v. United States Dept. of Energy, 719 F.2d 342, 345-46 (10th Cir. 1983). The Right to Financial Privacy Act was enacted to allow government authorities to obtain financial records from banks and other financial institutions. Nichols v. Council on Judicial Complaints, 615 P.2d 280, 283

(Okla. 1980). Neither law pertains to disclosure of information by pawnbrokers.

Plaintiff's Motion for Summary Judgment was to her fourth claim should be denied and defendants' Motion for Summary Judgment as to plaintiff's fourth claim should be granted.

Summary

In summary, defendants' Motion for Summary Judgment (#8) should be granted as to all to plaintiff's claims, and plaintiff's Motion for Summary Judgment (#10) should be denied as to all of her claims.

Dated this 15th day of May, 1990.

JOHN LEON WAGNER
UNITED STATES MAGISTRATE JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 90-C-508-E

ANNABELLE WINTERS d/b/a **SHARP'S PAWN SHOP,**	)
Plaintiff,	)
vs.	)
BOARD OF COUNTY COMMISSIONERS OF OSAGE COUNTY, OKLAHOMA, et al.,	)
Defendants.	)

ORDER

The Court has for consideration the Report and Recommendation of the Magistrate. That Report and Recommendation, filed May 15, 1991, was affirmed by Judge Cook on the grounds that no objections had been filed thereto. Subsequently, it was learned that Plaintiff had not received a copy of the Magistrate's Report and Recommendation. Therefore, Judge Cook vacated his Order Affirming and granted Plaintiff time to file her objections. In the interim, the case has been transferred to the undersigned. Having reviewed the record and the relevant authorities this Court now affirms the Magistrate's Report and Recommendation in all respects.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment is

denied; Defendants' Motion for Summary Judgment is granted.

So ORDERED this 10th day of February, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 90-C-508-E

ANNABELLE WINTERS d/b/a **SHARP'S PAWN SHOP,**	)
Plaintiff,	)
vs.	)
BOARD OF COUNTY COMMISSIONERS OF OSAGE COUNTY, OKLAHOMA, et al.,	)
Defendants.	)

JUDGMENT

This action came on for consideration by the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS THEREFORE ORDERED that the Plaintiff take nothing from the Defendants, and that the action be dismissed on the merits.

So ORDERED this 12th day of February, 1992.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX D

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 92-5055

ANNABELLE WINTERS, d/b/a Sharp's Pawn Shop,

Plaintiff-Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma; OSAGE COUNTY SHERIFFS DEPARTMENT; GEORGE WAYMAN, individually and as Sheriff of Osage County; ALLEN LANDSDOWN, individually and as Deputy Sheriff; DALE PENNY, individually and as Deputy Sheriff,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. NO. 90-C-508-C)

Laurence K. Donahoe, Oklahoma City, Oklahoma, for Plaintiff-Appellant.

David W. Lee, Oklahoma City, Oklahoma, for Defendants-Appellees.

Before **BRORBY**, **BARRETT**, and **EBEL**, Circuit Judges.

BRORBY, Circuit Judge.

Appellant, Annabelle Winters, appeals the district court's entry of summary judgment on her 42 U.S.C. 1983 claim against the County of Osage, the Sheriff's Department, and various officers within the Sheriff's Department. Ms. Winters, who does business as Sharp's Pawn Shop (Sharp's), brought this action to recover for violations of her constitutional rights arising out of the warrantless seizure of a ring from Sharp's premises and its subsequent disposition.

BACKGROUND

On November 9, 1988, Shelly Dean stole a men's diamond cluster ring from her uncle, George Ward. Ms. Dean pawned the ring at Sharp's for $50 that same day. On November 20, Mr. Ward reported the incident to Deputy Sheriff Dale Penny, who subsequently commenced an investigation.

Deputy Sheriff Penny filed a report and a probable cause affidavit for the arrest of Shelly Dean. Oklahoma law requires pawnshops to make available to law enforcement detailed records for every buy or pawn transaction. Okla. Stat. Ann. tit. 59, § 1515 (West Supp. 1993). Upon examining these records Deputy Sheriff Allen Landsdown discovered a men's diamond cluster ring pawned by Shelly Dean at Sharp's. The magistrate judge found that on March 2, 1989, Deputy Sheriff Landsdown went to the pawnshop for the express purpose of seizing the stolen ring.[1] Upon demand, the employees of the pawnshop procured the ring for Deputy Landsdown, who signed for its receipt.

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[1]Deputy Landsdown contends he went to the pawnshop to examine records pursuant to another burglary when he was telephone by officer Penny and advised to seize the ring.

The ring was subsequently used as evidence in the criminal proceedings against Shelly Dean. After entering a plea of no contest, Shelly Dean was ordered to pay $60 restitution ($50 she received for the pawn plus $10 interest). Appellant refused to accept the restitution check. Without conducting a hearing, the Sheriff's Department returned the ring to George ward.

Ms. Winters filed a complaint asserting the warrantless seizure and the disposition of the ring violated her Fourteenth, Fourth, and Fifth Amendment rights. Moreover, she challenged the constitutionality of three Oklahoma statutes relating to pawnbrokers (Okla. Stat. Ann. tit. 59, §§ 1508, 1515 (West Supp. 1993) and Okla. Stat. Ann. tit. 21, § 1092 (West 1989)). The magistrate

judge filed a report and recommendation which was adopted in full by the district court. The report concluded Ms. Winters suffered no abrogation of her constitutional rights, upheld the Oklahoma statutes as constitutional, and recommended the entry of summary judgment on behalf of the defendants.

A liberal reading of appellant's brief reveals that she challenges three issues on appeal. First, appellant challenges the constitutionality of the aforementioned Oklahoma statutes. Second, appellant contends the warrantless seizure of the ring violated Sharp's Fourth Amendment rights. Third, appellant argues the ultimate disposition of the ring violated Sharp's rights guaranteed by the Due Process Clause.

We review the district court's granting of summary judgment de novo. Eaton v. Jarvis Products Corp., 965 F.2d 922, 925 (10th Cir. 1992). Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Upon review, we do not find all appellees are entitled to judgment as a matter of law on the second and third grounds for appeal.

CONSTITUTIONALITY OF OKLAHOMA STATUTES

By establishing the Oklahoma Pawnbroker Act, Okla. Stat. Ann. tit. 59, § 1501 et. seq., the state established a comprehensive scheme to regulate licensing of pawnbrokers, monitor pawn transactions, and control usury rates charged by pawnshops. Appellant contends the

procedures mandated by Okla. Stat. Ann. tit. 59, § 1508 and § 1515 are unconstitutional.[2] Section 1508 allows the books, records, and property of licensed pawnbrokers to be examined without a warrant.[3] Section 1515 lists

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[2]Initially, appellant also challenged the constitutionality of Okla. Stat. Ann. tit. 21, § 1092, a criminal statute which charges pawnbrokers who refuse to exhibit stolen goods to a peace officer with a felony. In S & S Pawn Shop, Inc., v. City of Del City, 947 F.2d 432, 441-42 (10th Cir. 1991), we held that although the pawnshop owner was not charged with a felony, he had standing to challenge the Constitutionality of the statute. We concluded, however, to abstain from determining the constitutionality of that statute. Id. at 442. Presently, we adhere to our decision in S & S Pawn to abstain from addressing the constitutionality of the Oklahoma statute.

[3]Section 1508 was amended effective September 1, 1992, but changes to § 1508(A) were minimal. Prior to the amendment, § 1508(A) read in pertinent part:

> At such times as the Administrator [of Consumer Affairs] may deem necessary, the

the facts which must be included in the pawnbroker's report of all buy or pawn transactions, such as the identification of the customer and the description of the item being pawned or sold. This court previously upheld the constitutionality of

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> Administrator or his duly authorized representative may make an examination of the place of business of each licensee and may inquire into and examine the transactions, books, accounts, papers, correspondence and records of such licenses insofar as they pertain to the business regulated by this act. Such books, accounts, papers, correspondence, records and property taken, purchased or received shall also be open for inspection at any reasonable time to federal law enforcement officials and the chief of police, district attorney, sheriff, or written designee of the law enforcement body in whose jurisdiction the pawnshop is located, without any need of judicial writ or other process.

(Footnote omitted.)

the Oklahoma Pawnbroker Act. S & S Pawn, 947 F.2d at 436-440.

In S & S Pawn, the constitutionality of § 1508 was challenged for overbreadth and vagueness. In upholding § 1508 as constitutional, the court noted "warrantless administrative searches may be reasonable within the meaning of the fourth amendment when the premises are used in a closely regulated business or industry." Id. at 436. For a warrantless inspection in a closely regulated industry to be reasonable it must satisfy three criteria enunciated in New York v. Burger, 482 U.S. 691, 702-03 (1987): (1) there must be a substantial government interest; (2) "warrantless inspections must be 'necessary to further [the] regulatory scheme'"; and (3) the inspection program must provide a

"'constitutionally adequate substitute for a warrant.'" Id. (citation omitted). The court in S & S Pawn performed a detailed analysis of the Oklahoma statute in relation to the Burger criteria. S & S Pawn, 947 F.2d at 436-39. The court concluded the statute on its face adequately protects Fourth Amendment rights and is not overbroad or vague. Moreover, the court determined the Reporting requirements of § 1515 are constitutional, as "all [the] information pawnbrokers are required to record is potentially relevant to an investigation of stolen property by law enforcement officials." Id. at 438. Turning to the case at bar, Sharp's argues the Oklahoma statute does not provide a constitutionally adequate substitute for a warrant, and fails to channel the

discretion of the officers. We remain steadfast to our decision in S & S Pawn which addressed these same concerns and upheld the statute as constitutional.

The appellant in the present case also challenges the validity of the statute on different grounds. First, the appellant contends the Oklahoma Pawnbroker Act violates the privacy provisions of 5 U.S.C.A. § 522a (West 1977 & Supp. 1993) and 12 U.S.C.A. § 3401 et seq. (West 1989 & Supp. 1993). Second, appellant argues the statute violates the Due Process and Equal Protection clauses of the Fourteenth Amendment. Both of these contentions lack merit.

The provisions in 5 U.S.C.A. § 552a govern the conditions of disclosure of personal records by a federal agency. Information disclosed which does not

originate from federal agency records enjoys no protection under § 552a(b). See Thomas v. United States Dept. of Energy, 719 F.2d 342, 345 (10th Cir. 1983). Title 5 U.S.C.A. § 552a has no relevance to mandatory state disclosures required of pawnbrokers under the Oklahoma Pawnbroker Act. Similarly, pawnbrokers fall outside of the confidentiality protections of the Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq. Although § 3403 forbids a financial institution from disclosing a customer's financial records, a pawnshop is not considered a financial institution under the definition. Section 3401 provides: "'financial institution, means any office of a bank, savings bank, card issuer as defined in section 1602(n) of Title 15, industrial loan company, trust company, savings association, building and

loan, or homestead association (including cooperative banks), credit union, or consumer finance institution." Thus, pawnbrokers fall outside the scope of this Act as Congress did not intend for pawnbrokers or their customers to be afforded the protections given to financial institutions.

Appellant asserts the reporting requirements imposed on pawnbrokers as compared to the confidentiality protections banks enjoy violate the Due Process and Equal Protection clauses as there is no rational basis for disparate treatment. Appellant contends the amount of criminal activity occurring at pawnshops is indistinguishable from that occurring at banks. Economic regulations governing financial institutions violate the Equal Protection clause only if no

rational basis supports the regulation. Otero Savings Loan Ass'n. v. Federal Home Loan Bank Bd., 665 F.2d 279 (10th Cir. 1981). We previously held the regulation of pawnshops is a substantial government interest as they provide a market for stolen property. S & S Pawn, 947 F.2d at 436-37. Therefore, it is certainly rational for Oklahoma to impose greater disclosure requirements on pawnshops than on banks. As a result, we continue to uphold the facial constitutionality of the Oklahoma Pawnbroker Act.

PROPRIETY OF THE SEIZURE

The Fourth Amendment made applicable to the States by the Fourteenth Amendment guarantees the right of the people to be secure against unreasonable searches and seizures. Soldal v. Cook County, _____

U.S. _____, _____, 113 S. Ct. 538, 540 (1992). "A plaintiff may bring suit under § 1983 for state officials, violation of his...freedom from unreasonable searches and seizures." Zinermon v. Burch, 494 U.S. 113, 125 (1990). Appellant brings this § 1983 claim contending the officers, seizure of the ring was unconstitutional. Appellant argues the officers' sole intention upon entering the pawnshop was to seize the ring, and therefore the warrantless seizure was a Fourth Amendment violation. Appellees counter that once the officers were lawfully on the premises of the pawnshop under the statute, the seizure of the ring was justifiable under the plain view doctrine. The magistrate judge made the following determinations: "the officers were lawfully in the pawnshop and by statute had a lawful right

of access to the ring. However, there was no reason that the officers could not have obtained a warrant to take the ring."[4] These determinations were adopted in full by the district court. We review such legal determinations de novo.

A seizure of property "occurs when 'there is some meaningful interference with an individual's possessory interests in that property.'" Soldal, _____ U.S. at _____, 113 S. Ct. at 540 (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)). "[S]eizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the of the Amendment has taken place".

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[4]The magistrate judge's findings are somewhat confusing. Because he found the officers could have obtained a warrant, he determined that they were not entitled to qualified immunity, yet he still recommended the entry of summary judgment on this claim.

Soldal, _____ U.S. at _____, 113 S. Ct. at 547. Fourth Amendment safeguards apply to commercial premises as well as homes. See Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); See v. Seattle, 387 U.S. 541, 543 (1967). Further, an individual and his private property are fully protected by the Fourth Amendment even when the individual is not suspected of criminal activity. Camara v. Municipal Court, 387 U.S. 523, 530 (1967). Sharp's had a constitutionally protected property interest in the ring. See Wolfenbarger v. Williams, 774 F.2d 358, 362 (10th Cir. 1985), cert. denied, 475 U.S. 1065 (1986) (Wolfenbarger I). Thus, the threshold issue is whether the officer's seizure of the ring violated the Fourth Amendment rights of the appellant.

Appellees suggest a two-stage analysis to justify the seizure of the ring. First, the officers were lawfully on the premises in accordance with § 1508, which authorizes peace officers to execute administrative searches to ensure compliance with the Oklahoma Pawnbroker Act. Second, once the officers were lawfully on the premises they were entitled to seize any evidence of criminal activity in plain view. Appellees rely on Horton v. California, 496 U.S. 128, 130 (1990), for the proposition that inadvertence is not a necessary condition of a plain view seizure.[5] A four-part test derived from Horton and adopted by our circuit upholds plain view seizures if

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[5]Horton overruled the Tenth Circuit's holding in Wolfenbarger v. Williams, 826 F.2d 930, 934-36 (10th Cir. 1987) Wolfenbarger II), requiring inadvertence for a plain view seizure to be lawful.

> (1) the item is indeed in plain view; (2) the police officer is lawfully located in a place from which the item can plainly be seen; (3) the officer has a lawful right of access to the item itself; and (4) it is immediately apparent that the seized item is incriminating on its face.

United States v. Corral, 970 F.2d 719, 723 (10th Cir. 1992) See Horton, 496 U.S. at 136-37. The facts of this case do not support the conclusion that the warrantless seizure was justified under the plain view doctrine.

The rationale behind the plain view doctrine allowing warrantless seizures is that once an officer is legitimately on the premises and has a lawful right of access to property which is in plain view, the seizure of such property is not an intrusion on Fourth Amendment privacy rights. Horton, 496 U.S. at 141. Although the ring may have been visible in a

display case, Deputy Landsdown did not have a lawful right of access to it. Instead, he asked the pawnshop clerk to produce the ring described in the § 1515 report. Because the Deputy never saw the ring until it was provided to him by Sharp's, justifying the seizure as plain view would be a mischaracterization.

More importantly, the seizure may not be justified by asserting pretextual reasons for the officer's presence on the premises in combination with the plain view doctrine. Appellees rely on § 1508 to justify Deputy Landsdown's presence. The language of § 1508 specifically allows for administrative examinations "of the place of business of each licensee and... [inquiry] into...the transactions, books, accounts, papers, correspondence and records of such licensee insofar as they

pertain to the business regulated" by this act. In accordance with the Fourth Amendment, § 1508 does not permit the officer to seize any evidence, but merely examine it. On the day of the seizure, the record reflects Deputy Landsdown entered the pawnshop with the sole purpose of seizing the ring.[6] If we were to allow an officer under the guise of the administrative statute to seize evidence of criminal activity without a warrant when the officer has a particularized

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[6]Deputy Landsdown contents that his presence in the pawnshop was a legitimate administrative search under § 1508 was he was investigating pursuant to an unrelated burglary. For the purposes of this analysis, however, this is not a genuine issue as to a material fact. According to his affidavit, Deputy Landsdown was advised to seize the ring after conferring with Deputy Penny on the pawnshop phone. Deputy Landsdown never had a lawful right of access to the ring. Therefore, even according to Deputy Landsdown's affidavit, the seizure of the ring was unconstitutional.

suspicion regarding that evidence, we would eradicate the Fourth Amendment protections enjoyed by the pawnshop.

Although we upheld the constitutionality of the Oklahoma statutes in S & S Pawn, we cautioned that the execution of an administrative search pursuant to direct criminal suspicion raises grave constitutional concerns. S & S Pawn, 947 F.2d at 441. We noted that the exigent circumstances allowing a warrantless administrative search evaporate when the police intend to seize particular criminal evidence. "Once it is discovered that a pawnshop possesses stolen property, 'spot' searches are no longer necessary. Moreover, after the pawn tickets are turned over to the enforcing officer, 'surprise' no longer appears to justify the necessity of a

warrantless search." Id. at 441 n.7. Simply put, when a law enforcement officer intends to seize a particular piece of criminal evidence from the premises of a pawnshop, the seizure may not be substantiated by relying on the pretense of an administrative search coupled with the plain view doctrine. In such a situation, the officer must obtain a warrant.[7] Thus, we reverse the district

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[7]In the alternative, the defendants argue that exigent circumstances existed justifying the seizure of the ring. Because they believed the owner of the ring would attempt to retrieve it, the defendants claimed that this constituted exigent circumstances necessitating its immediate seizure. While exigent circumstances may abrogate the need for a warrant, no such exigencies existed in this case as the record clearly indicated that the defendants could have placed a hold on the ring until a search warrant was procured. See Wolfenbarger II, 826 F.2d at 936 (concluding that exigent circumstances did not support a warrantless search of a pawnshop where officers had placed a hold on items seized).

court and find there was a seizure in violation of Ms. Winter's Fourth Amendment rights.[8]

Because the doctrine of respondeat superior does not apply to actions brought under § 1983, Deputy Penny and Sheriff Wayman are not liable unless they have an

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[8]Appellees claim qualified immunity precludes an action for damages under § 1983 because the deputies did not violate Ms. Winter's clearly established constitutional rights. See Anderson v. Creighton, 483 U.S. 635, 640 (1987). Although S & S Pawn had not yet been decided prior to the seizure, it had been clearly established for qualified immunity purposes that Sharps had a constitutionally protected property interest in the ring. See Wolfenbarger II, 826 P.2d at 932-34. Moreover, although § 1508 allows peace officers to enter the premises of a pawnshop to search the business records of the shop, it was well established at the time of the search that a pretextual administrative search could not validate a plan view seizure. See Burger, 482 U.S. at 716-717 n. 27. Since we conclude the warrantless seizure violated clearly established law, we hold that the Deputies do not enjoy qualified immunity.

affirmative link to the constitutional violations. Kaiser v. Lief, 874 F.2d 732, 736 (10th Cir. 1989). Before a superior may be held liable under the affirmative link requirement, he must have participated or acquiesced in the constitutional deprivations. Kite v. Kelley, 546 F.2d 334, 337 (10th Cir. 1976). According to Officer Landsdown, Deputy Penny contacted Officer Landsdown on the pawnshop phone and advised him to seize the ring. Conversely, according to Deputy Penny, Deputy Landsdown informed him by telephone that he had discovered through examining pawn tickets that the ring was at Sharp's, and then went to Sharp's and seized the ring. Deputy Penny does not indicate that he requested Deputy Landsdown to seize the ring. Because of the conflicting accounts of the deputies,

there is a genuine factual dispute in the record regarding whether Deputy Penny was affirmatively linked to the unlawful seizure. Therefore, we must remand this issue to allow the trier of fact to determine whether Deputy Penny participated or acquiesced to the seizure. On the other hand, the record indicates no affirmative link involving Sheriff Wayman in the unconstitutional seizure, and summary judgment was properly entered on his behalf in relation to the seizure claim.

Moreover, in order for the County and the Sheriff's Department to be liable under § 1983 the constitutional violation must be a result of a government custom or policy. Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978). The County and Sheriff's department may also

be held liable if the deputies were inadequately trained so that "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." City of Canton v. Harris, 489 U.S. 378, 388 (1989). The record contains no evidence that the unconstitutional seizure reflected to the Sheriff's Department or the County's policy nor does it indicate that the deputies were inadequately trained. Therefore, the entry of summary judgment in favor of the Sheriff's Department and County on the seizure claim was also appropriate. In summary, although we find the seizure was unconstitutional, we uphold the granting of summary judgment on behalf of Sheriff Wayman, the Sheriff's Department, and the County, and remand to determine whether

Deputy Penny was affirmatively linked to Deputy Landsdown's unlawful seizure.

DISPOSITION OF THE RING

Appellant's next claim focuses upon the adequacy of the process they received upon the ultimate disposition of the ring, rather than the propriety of the seizure itself. On September 28, 1989, the Sheriff's Department, without a hearing to identify the proper owner of the ring, returned the ring to George Ward. We first note the disposition must comply with the notice and hearing requirements specifically articulated in the Oklahoma statutes in effect at the time of the disposition addressing the return of stolen property. Okla. Stat. Ann. tit. 22 § 1321 (West 1986, as amended by Laws 1987, c. 174, § 3, and Laws 1988, c. 178

§ 1)[9] and 1322 (West 1986, as amended by Laws 1988, c.178, § 2).[10]

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[9]Effective November 1, 1988 § 1321(C) read as follows:

When property alleged to have been stolen or embezzled, comes into the custody of a peace officer, he shall hold it subject to the order of the magistrate authorized by Section 1322 of this title to direct the disposal thereof. Within fifteen (15) days of the time the owner of such property is known, the peace officer shall notice the owner of such property that the property is in the custody of the peace officer.... the owner of the property or designated representative of the owner may make application to the magistrate for the return of the property.... The applicant shall notify the last person in possession of such property prior to such property being seized by the state of the hearing.... The application shall notify the district attorney and the court when notice has been served to the last person in possession of such property or published pursuant to this section. The hearing shall be held not less than ten (10) days or more than twenty (20) days after the court has been notified that the notice has been served or published.

[10]After the 1988 amendments § 1322 read in pertinent part:

Second, such action must conform with the protections provided by the Due Process Clause, "the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982). Indeed, the magistrate judge found the disposition of the ring did not afford the pawnshop due process. The magistrate judge, however, also found the deprivation of due process was moot because the pawnshop admitted at the hearing on motions for summary judgment

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On satisfactory proof of title to the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or embezzling the property, may order it to be delivered to the owner on his paying the reasonable and necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitles the owner to demand and receive the property.

the ring was properly given to its true owner. Actually, the pawnshop only acknowledged they had no evidence to dispute that Mr. Ward was the true owner. Appellees contend the pawnshop has no cause of action under § 1983 since Sharp's can make no claim of ownership and was fully compensated for the loss.

Upon returning the ring to Mr. Ward, the Sheriff's Department ignored the procedural guarantees ensured by the Due Process Clause. See Zinermon, 494 U.S. at 125. We previously held that pawnshops have a constitutionally protected property-interest in items being held for pawn. Wolfenbarger I, 774 F.2d at 362. The Due Process Clause requires at a minimum that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for 'hearing

appropriate to the nature of the case. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) Appellant must be given the opportunity to present her case for ownership on the merits regardless of the likelihood for success.[11] Thus, the fundamental issue is not who is the true owner of the ring, but whether the Sheriff's Department, in disposing of the ring, afforded the appellant adequate procedural due process through notice and hearing. The deprivation of procedural due process is

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[11]Of course, a party may waive the right to a due process hearing as was noted by the addition of Okla. Stat. Ann. tit. 22 § 1321(f) in the 1992 Amendments (c. 83, § 1) which states, "The notice and hearing provision of subsections C and E of this section shall not be required for return of the property specified in said subsections if there is not dispute concerning the ownership of the property and the property is readily identifiable by the owner."

not complete unless and until the state fails to provide adequate constitutionally essential procedures. Zinermon, 494 U.S. at 126.

In Hudson v. Palmer, 468 U.S. 517 (1984), and Parratt v. Taylor, 451 U.S. 527 (1981), the plaintiffs were precluded from asserting a due process § 1983 claim because the State had provided a meaningful post-deprivation remedy. Appellees contend that an adequate post-deprivation remedy exists in Okla. Stat. Ann. tit. 22, 991a-3.[12] The Supreme Court

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[12]Okla. Stat. Ann. tit. 22, § 991a-3 states in part:

> A. Upon a verdict or plea of guilty or upon a plea of nolo contendere for an offense in which any property is unlawfully obtained and the property is sold, traded, bartered, pledged or pawned, the court may order the defendant to provide restitution to the buyer, recipient or pledgee of the

in Parratt and Hudson clarified that an adequate post-deprivation remedy relieves due process concerns only for random and unauthorized deprivations of property. Parratt, 451 U.S. at 541-44; Hudson, 468 U.S. at 531-33. The Court reasoned that when such an act is random and unauthorized "the State cannot predict precisely when the loss will occur," thus "[i]t is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place." Parratt, 451 U.S. at 541. In Hudson, the Court emphasized " [t]he controlling inquiry is solely whether the state is in a position to provide for predeprivation process." Hudson, 468 U.S. at 534. In both Hudson and Parratt, the Court

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property for the value of any consideration paid, loaned or given for the property....

determined that no such opportunity for a predeprivation hearing was present and declared the postdeprivation remedies adequate.

In the case at bar, the Sheriff's Department ignored the predeprivation procedures provided by the legislature in Okla. Stat. Ann. tit. 22, §§ 1321-1322. We previously addressed the applicability of Hudson and Parratt to the disposition of stolen property by the local government in violation of due process in Wolfenbarger I. In Wolfenbarger I, we held such a deprivation of property was not random or unauthorized, as "[t]he existence of sections 1321 and 1322 belie any suggestion that the state has or recognizes any need for such swift or expedited action, once the police have secured the property. Wolfenbarger I, 774

F.2d at 364. The importance of following established due process procedures is fundamental:

> "The requirements of the due process clauses are directed specifically to the federal and state governments. They require the promulgation of laws and regulations providing for regular procedures which the government must follow before it may deprive an individual of life, liberty or property. The execution of those laws and regulations also must conform to due process; otherwise the due process clause, with its guarantees of regular and predictable procedures, becomes a cipher. It is beyond cavil that due process requires more than the mere promulgation of laws and regulations

which, if followed, would preserve the most fundamental of rights."

Id. (emphasis omitted) (quoting Patterson v. Coughlin, 761 F.2d 886, 891 (2d Cir. 1985), cert. denied, 474 U.S. 1100 (1986)). Oklahoma has established safeguards to assure compliance with due process through §§ 1321 and 1322. The Osage Sheriff's Department cannot ignore these requirements and then contend the appellant has suffered no due process violation since there is an adequate postdeprivation remedy. Available postdeprivation procedures are insufficient to neutralize a due process violation when the action is planned and authorized. Lavicky v. Buxmett, 758 F.2d 468, 473 (10th Cir. 1985), cert. denied, 474 U.S. 1101 (1986).

The Secretary of the Osage Sheriff's Department released the ring to Mr. Ward. Although the Secretary does not recall under whose authority the ring was released, the release was authorized. Because the Sheriff's Department authorized the release of the ring without adhering to the applicable procedures which would have ensured due process, the pawnshop maintains a viable § 1983 action against the Department. Appellant presents no evidence indicating that Deputy Penny, Deputy Landsdown, or Sheriff Wayman participated in or acquiesced to the improper disposition of the ring. See Kite, 546 F.2d at 337. Moreover, nothing in the record supports the theory that the unconstitutional disposing of the ring was County policy. See Monell, 436 U.S. at 694. Therefore, summary judgment was

appropriately entered on behalf of the County, Sheriff Wayman, Deputy Penny, and Deputy Landsdown on this claim.

In summary, we uphold the constitutional validity of the Oklahoma Pawnbroker Act on its face. Under the circumstances of this case, however, the seizure of the ring and its disposition were in violation of Sharps constitutional rights guaranteed by the Fourth Amendment and Due Process Clause. Because Sharp's stated a viable § 1983 action, the entry of summary judgment on these claims was improper. We remand for further proceedings consistent with this opinion.

AFFIRMED in part, **REVERSED** in part and **REMANDED.**

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 92-5055

ANNABELLE WINTERS, doing business as Sharp's Pawn Shop

Plaintiff-Appellant,

v.

BOARD OF COUNTY COMMISSIONERS, of Osage County, Oklahoma; OSAGE COUNTY SHERIFFS DEPARTMENT; GEORGE WAYMAN, individually, and as Sheriff of Osage County; ALLEN LANDSDOWN, individually, and as Deputy Sheriff; DALE PENNY, individually, and as Deputy Sheriff,

Defendants-Appellees.

ORDER
Entered October 6, 1993

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on

rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: _____
Patrick Fisher, Chief Deputy Clerk